No. _____

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In The

Supreme Court of the United States

PHILIP F. ANSCHUTZ,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER JOHN E. McCORMAC,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a non-resident director of a publicly traded corporation is subject to personal jurisdiction for fraud suits in the courts of every State where the corporation has investors.

2. Whether the "conspiracy" theory of personal jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment and, if so, whether the theory applies when the "conspiracy" consists of routine corporate conduct.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are petitioner Philip F. Anschutz; respondent State of New Jersey, Department of Treasury, Division of Investment, by Treasurer John E. McCormac; and Robert S. Woodruff and Robin R. Szeliga. Mr. Woodruff and Ms. Szeliga are also filing a separate petition for a writ of certiorari to the court below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division (App. 1-20) is reported at 904 A.2d 786. The opinion of the Superior Court of New Jersey, Law Division (App. 24-49) is unreported. The New Jersey Supreme Court's order denying review (App. 50) is unreported.

JURISDICTION

The Appellate Division's opinion was entered on August 16, 2006. The Supreme Court of New Jersey denied review on December 8, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a). This Court has jurisdiction because, if it granted review and reversed the judgment, that would preclude any further litigation in the state courts of New Jersey. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *Calder v. Jones*, 465 U.S. 783, 788 n. 8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This petition raises important and recurring questions of federal constitutional law, on which the lower state and federal courts are divided. Based on its expansive view of *Calder v. Jones*, 465 U.S. 783 (1984), the Appellate Division concluded that a director of a public corporation was subject to suit in New Jersey because the corporation issued press releases, made securities filings, and had an investor relations division. App. 11. It was enough, in the Appellate Division's view, for the director to be inferentially aware that the corporation's securities filings would "have an impact on . . . recipient-investors" "wherever they might be located." App. 15. As the plaintiff here was located in New Jersey, and had "request[ed] to receive information" from the corporation, the director became subject to suit there. App. 15. The Appellate Division added that its result was buoyed by the prospect of the State's courts "entertaining this action to recoup significant public funds" for the State. App. 19.

In response to the director's evidence (App. 52) that he neither made nor directed any statement to the plaintiff in New Jersey, the Appellate Division applied the "conspiracy theory" of jurisdiction, under which the specific defendant's actual contacts with the forum are irrelevant. App. 16. The Appellate Division identified the "conspiracy" as the "establish[ment]" of the corporation's investor relations division. App. 17.

The Appellate Division's opinion therefore adopted two controversial and important jurisdictional doctrines which this Court has never approved. First, the Appellate Division held that an allegedly injured plaintiff may sue in tort "wherever they might be located." This jurisdictional

doctrine – which makes jurisdiction proper wherever the "effects" of a tort are felt by the plaintiff – has divided the lower courts, and a present circuit split exists on the question. Second, the Appellate Division found jurisdiction to be proper under a "conspiracy" theory, and identified the conspiracy as the "establishment" of a corporation's investor relations department. As with the "effects" test, the conspiracy theory of jurisdiction has divided the lower courts.

In the context of this case, there is a particular urgency for this Court to review these two jurisdictional innovations. In recent years, Congress has recognized, and tried to reduce, the abusive filing of securities fraud lawsuits in the state courts. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1513-1514 (2006). The decision below threatens that goal. Combining the "effects" and "conspiracy" theories of jurisdiction means that every director who is aware that a public corporation's public filings are actually disseminated to the public becomes subject to suit for securities fraud in the courts of every State. The Court should grant review to determine whether the Due Process Clause permits that result.

A. Factual Background and Proceedings in the Trial Court

The respondent (the State of New Jersey's Department of Treasury) was an investor in the securities of Qwest Communications International Inc. ("Qwest"). App. 5. The petitioner, Philip F. Anschutz, was a Qwest director and shareholder. App. 6. Claiming that Qwest's stock price had been inflated by fraud, respondent sued Qwest itself, along with Mr. Anschutz and a number of other officers

and directors of Qwest. The suit was filed in state court in Trenton, New Jersey.

As a Qwest director, Mr. Anschutz signed certain of Qwest's filings with the Securities and Exchange Commission in Washington, D.C. According to respondent, those filings contained false and misleading information. Further, according to respondent, it received those filings in New Jersey, at its request, from Qwest's investor relations department. App. 15. The evidence showed that Mr. Anschutz did not send any of those filings to respondent. App. 52.

Mr. Anschutz moved to dismiss for lack of personal jurisdiction before the Superior Court, Law Division. In an oral opinion, the trial court denied the motion. App. 24-49. The trial court, adopting a "stream of commerce" theory of personal jurisdiction, concluded that Qwest stock was a "product" moving in commerce, and that Mr. Anschutz was therefore properly subject to suit wherever the stock ended up. App. 35-36.

Mr. Anschutz moved for leave to appeal to the Superior Court, Appellate Division, and leave was granted.

B. The Decision of the Superior Court, Appellate Division

On appeal, the Appellate Division purported to reject the trial court's "stream of commerce" jurisdiction theory. App. 19. The Appellate Division, however, concluded that jurisdiction was proper over Mr. Anschutz, because he had signed certain SEC filings, and therefore could be sued for securities fraud "wherever [Qwest investors] might be located." App. 15. The Appellate Division reasoned that

"an intentional communication of information with knowledge or purpose that it will cause harm" was sufficient "to establish the requisite minimum contacts" required for jurisdiction. App. 11-12. The Appellate Division held that mere "knowledge" that information would "cause harm" was sufficient to show that a non-resident had "purposefully invoked the benefits and protections" of New Jersey's law, so that due process was satisfied. App. 13. According to the Appellate Division, the constitutionally controlling question was whether New Jersey was "the focal point of the harm" the respondent allegedly suffered. App. 16.

In response to Mr. Anschutz's evidence that he had not in fact communicated with the respondent, *see* App. 52, the Appellate Division adopted the "conspiracy theory" of personal jurisdiction. App. 16-17. According to the Appellate Division, Mr. Anschutz "conspired" to establish an investor relations division within Qwest. App. 17. Because Qwest's investor relations division knew that the respondent, at its request, was receiving Qwest's public filings and press releases, the Appellate Division concluded that Mr. Anschutz would be charged with that knowledge as well. App. 17.

The Appellate Division made certain other observations, the relevance of which it did not explain. The court thought that Mr. Anschutz sold stock to BellSouth in "late 2001 and early 2002." App. 10; *but see* S. Mehta, "Qwest To Sell 10% Stake To BellSouth," Wall Street Journal, April 20, 1999, p. A3 (noting in 1999 that "Anschutz [Company], will sell an additional 16.65 million shares to BellSouth[.]"). Even leaving aside the mistaken date, the connection with New Jersey was not explained. The court also noted that Qwest's former CEO was hired in New

Jersey and worked from there at times, but did not explain why the CEO's residence subjected Mr. Anschutz to suit in New Jersey. App. 19. The court also said that the former CEO communicated with Mr. Anschutz on "every major decision," but did not assert that those communications happened in New Jersey. App. 6. In any event, these observations seem to be make-weights: the Appellate Division was clear that the respondent's alleged injury in New Jersey was by itself enough to subject Mr. Anschutz to suit. App. 13 (holding that "knowledge" of "causing harm within this State" suffices for jurisdictional due process).

REASONS FOR GRANTING THE PETITION

The lower courts, and litigants in general, urgently need guidance concerning fundamental questions of jurisdictional due process. As the decision below shows, some lower courts have read this Court's prior cases to support jurisdiction wherever the harm from an alleged intentional tort is felt. *See* App. 13 (opinion below); *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 67 (2000); *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (Easterbrook, J.). Others (including the federal circuit embracing New Jersey) have concluded that the plaintiff must show some act by the defendant specially and directly targeted to the forum State. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3rd Cir. 1998); *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995); *Griffis v. Luban*, 646 N.W.2d 527, 534-535 (Minn. 2002), *cert. denied,* 538 U.S. 906 (2003). The Third Circuit has expressly recognized the circuit split on this issue, a split

also present among the state courts. *IMO Indus.*, 155 F.3d at 263-265.

Which of the two views is correct has obvious and important consequences for the ability of the several States to regulate and adjudicate conduct occurring far from their borders, and for the ability of private actors to conduct business with some control over the "jurisdictional consequences of their actions." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997). At present, both New Jersey and the Seventh Circuit, both centers of significant economic activity, hold that injury is enough for jurisdiction. Other courts disagree. The state and federal courts embracing New Jersey are themselves split. The lower courts have no way to resolve their disagreement over the question, a disagreement that has existed now for nearly a decade, and this Court itself should be the one to decide whether its prior cases support universal jurisdiction by a State over non-residents based upon alleged injury to a citizen of the State.

The lower courts are likewise split on the question of whether an allegation of conspiracy suffices for personal jurisdiction. This Court has never approved a conspiracy theory of jurisdiction, and its recognition is in great tension with this Court's prior decisions. As the decision below shows, an averment of "conspiracy" can be easily used to avoid the traditional limitations on state adjudicatory authority imposed by the Due Process Clause. The consequences are particularly profound and troubling when routine corporate action (such as "conspiring" to establish an "investor relations division") can be treated as a jurisdictionally sufficient basis for personal jurisdiction on a conspiracy theory.

I. The Decision Below Deepens a Split Over the Limits of Jurisdictional Due Process, Conflicts With the Decisions of This Court, and Raises Important and Recurring Issues

The Appellate Division found jurisdiction over Mr. Anschutz based on his assumed knowledge that Qwest's public statements would have an "impact" on investors, "wherever they might be located." App. 13, 15. The lower court's reasoning deepens and extends a pre-existing split on this issue. That reasoning reflects a continuing confusion over the jurisdictional scope of *Calder* and conflicts with this Court's holdings. Finally, the decision below concerns an important and recurring issue of federal constitutional law, one made more pressing by Congress's expressed desire to prevent abusive securities fraud lawsuits from being filed in state courts. Congress's purpose would be frustrated, and important federal policies undermined, if state courts could assert the virtually unlimited jurisdiction asserted by the court below.

A. The Appellate Division's Opinion Deepens and Extends a Split in the Lower Courts on Basic Questions of Jurisdictional Due Process

1. A persistent split exists in the lower courts over the question of whether the mere effects of a defendant's conduct, if felt in the forum State, are sufficient to support personal jurisdiction. In *Janmark v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997), the Seventh Circuit held that "there can be no serious doubt after *Calder v. Jones* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." In this

case, the lower court likewise concluded that it had jurisdiction over Mr. Anschutz, even though the allegedly tortious conduct was no more directed at New Jersey than at any other state, simply because New Jersey was "the focal point of a harm" the respondent suffered. App. 16.

2. Other courts, however, have rejected the view that a forum always has jurisdiction over a defendant if the plaintiff claims to have suffered injury in the forum. *See Griffis*, 646 N.W.2d at 533 (noting division among courts over scope of the *Calder* decision). The Third Circuit, for example, read *Calder* to require that the forum be the "focal point," not just of the alleged harm, but of the allegedly tortious activity itself. *IMO Indus.*, 155 F.3d at 265-266. As the Third Circuit explained, the decisions of the Fourth, Fifth, and Tenth circuits are in accord. *Id.*, at 261-263.

3. The division among the lower courts arises from their disagreement over this Court's decision in *Calder*. *See* Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time For the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 Cath. U. L. Rev. 53, 95 & n. 278 (Fall 2004) (noting that *Calder* "has proved particularly troublesome in the lower federal and state courts") (hereinafter Condlin); *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 624 & n. 7 (1st Cir. 2001) (noting that the lower courts have "struggled" with *Calder* and that "several circuits do not appear to agree as to how to read *Calder*.").

Like the court below, some read *Calder* to hold that a plaintiff who feels the "effects" of an intentional tort in a forum may sue there. *See* Condlin, *supra*, at 95 n. 278. Those courts focus on the Court's statement in *Calder* that

the defendants "knew" that the harm would be felt in California, and conclude that mere foreseeability of harm in the forum is enough for jurisdictional due process. *See* Condlin, *supra*, at 95 (noting that the Court "used the language of foreseeability" to uphold personal jurisdiction); *Calder*, 465 U.S. at 789-790. However, other courts, adhering to the Court's holding in other cases that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *see, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-297 (1980), have required the plaintiff to show that the defendant "expressly aimed his conduct at the forum such that the forum can be said to be the focal point of the tortious activity." *IMO Indus.*, 155 F.3d at 266.

4. It is a significant question, worthy of this Court's review, whether *Calder* broadly stands for the proposition that, as the lower court put it, "knowledge" of possible "harm" within a forum "satisfies" jurisdictional due process. App. 13; *see also Janmark*, 132 F.3d at 1202. In the modern economic world of the United States, all kinds of conduct with no special connection to a State can conceivably cause "harm" in that State, and a defendant would be hard-pressed to deny "knowledge" that, for example, persons in New Jersey can invest in public companies. *Cf. Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 108 (1987) (plurality opinion) (reversing finding of personal jurisdiction over defendant who "knew that some of [its products] would be incorporated into tire tubes sold in California" and "benefited indirectly from the sale in California of products incorporating its products."). Aggressive readings of *Calder* like that of the court below expose participants in the economy to the threat of multiple lawsuits in distant forums hosted by

states with which the defendant has "no meaningful contacts, ties, or relations," *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985) (citation and quotation omitted), a prospect made worse if, as the court below held, the prospect of the State's "recoup[ing] significant public funds" for itself is itself a reason for the State's courts to exercise jurisdiction. App. 19.

5. The decision below also deepened and extended another existing split in the lower courts over whether, and in what circumstances, a non-resident defendant without actual contacts with a forum may nevertheless be sued there because of his or her alleged participation in a conspiracy. The court below adopted the view that an alleged conspiracy will support jurisdiction, even if the "conspiracy" seems to consist of establishing an "investor relations division." App. 16-17. In so holding, the Appellate Division disagreed with the courts that have rejected this theory of jurisdiction as inconsistent with due process, *see, e.g., Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (rejecting the theory); *Hewitt v. Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995) (same); *Mansour v. Superior Court*, 38 Cal. App.4th 1750, 1760-1761 (Cal. Ct. App. 1995) (same); *cf. Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (doubting, but not deciding, that the theory is consistent with due process), and aligned itself with the courts that have adopted it. *See, e.g., Mackey v. Compass Marketing, Inc.*, 892 A.2d 479 (Md.), *cert. dismissed*, 127 S. Ct. 341 (2006); *Chenault v. Walker*, 36 S.W.3d 45, 53-54 (Tenn. 2001); *Execu-tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So.2d 582, 583-584 (Fla.), *cert. denied*, 498 U.S. 952 (1990); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798-799 (S.C.), *cert. denied*, 498 U.S. 952 (1990); *Istituto Bancario*

Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982); *Textor v. Board of Regents*, 711 F.2d 1387, 1392-1393 (7th Cir. 1983).

6. Moreover, even courts that have adopted the conspiracy theory have differed as to its scope. Some require a "substantial act in furtherance of the conspiracy performed in the forum state," *Textor*, 711 F.2d at 1393, while others do not. *Mackey*, 892 A.2d at 495-496. Some require a true agency relationship between the alleged conspirators, *see, e.g., Istituto*, 449 A.2d at 224, while others do not. *Mackey*, 892 A.2d at 495-496. Some require a showing of individual benefit to the alleged conspirator, *see Istituto*, 449 A.2d at 224, while others do not. *Mackey*, 892 A.2d at 495-497.

7. The Appellate Division here apparently adopted the widest possible view of the conspiracy theory of jurisdiction, applying it to a "conspiracy" consisting of establishing an investor relations division, and finding "overt acts" (though not "substantial" ones) in the corporation's dealings with companies located in New Jersey. App. 17-18.[1] If a public company can be so easily recast as a "conspiracy," its officers and directors will find themselves subject to suit wherever the company does business. That surprising result, as well as the continuing confusion in the lower courts over the existence and scope of a

[1] The Appellate Division refers, vaguely, to Mr. Anschutz's alleged "involvement in Qwest's dealings with Tellium[.]" App. 18. The Appellate Division does not say that Mr. Anschutz himself had any "dealings with Tellium," as he did not. The record will show that Mr. Anschutz's "dealings" consisted of approving the purchase of Tellium stock by Qwest officers and directors.

"conspiracy theory" of personal jurisdiction, merits this Court's review.

B. Continuing Confusion Exists in the Lower Courts Over the Meaning of This Court's Jurisdictional Precedent

1. The confusion in the lower courts stems from their disagreement over how to read the Court's jurisdictional precedents, an area of law this Court has not addressed since 1990. *Burnham v. Superior Court*, 495 U.S. 604 (1990). As noted above, some read *Calder* to require only that the defendant "know" that his or her conduct might cause harm in the forum, while others require something more than mere foreseeability. Condlin, *supra*, at 95 & n. 278. Some courts read this Court's precedent to foreclose a "conspiracy theory" of personal jurisdiction, while others see no obstacle. *Mackey*, 892 A.2d at 138 n. 4 (describing disagreement over whether this Court's decisions in *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953) and *Rush v. Savchuk*, 444 U.S. 320 (1980) permit recognition of the "conspiracy theory" of jurisdiction). The disagreement over these fundamental issues leaves persons at sea, with no clear idea how to structure their primary conduct with some degree of assurance as to where they can, and cannot, be sued. Condlin, *supra*, at 147 ("It has been twenty years since the decision in *Burger King*, the last of the Court's major personal jurisdiction decisions, and confusion and disagreement are the order of the day."). Indeed, whether a person can be sued might depend on nothing more than whether he or she is sued in state or in federal court in Trenton, New Jersey. Only this Court can bring needed clarity to this important area of the law.

C. The Issue is Important and Recurring, Especially in the Context of State Fraud Lawsuits Based on Nationally Traded Securities

1. Personal jurisdiction is a threshold question in every case, and is one of the most litigated issues in the state and federal courts. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 531 & n. 5 (1995). Basic confusion over such a common and much-litigated question of federal constitutional law alone merits this Court's review.

2. Moreover, the issue is particularly important in the context of this case. As this Court has recognized, Congress has tried to limit the abusive filing of securities fraud lawsuits in the state courts. *Merrill Lynch*, 126 S. Ct. at 1513-1514. Such lawsuits increase the risk, and decrease the appeal, of serving as a director of a public company, to the detriment of the economy as a whole.

3. The decision below, if not reviewed, will dramatically increase the risk of associating with a public company. Under the decision below, mere knowledge that a corporation's public filings are disseminated to investors "wherever they might be located" suffices for personal jurisdiction. App. 15. The usual way of avoiding personal jurisdiction – namely, by not engaging in "some act by which the defendant purposefully avails [him or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Burger King*, 471 U.S. at 475 – hardly applies to the director of a public company, who has no feasible way to prevent persons "wherever they might be located" from buying stock traded on the New York Stock Exchange. The unappealing option for a director is to resign, or to resign himself to the idea that his property is now subject to the

adjudicatory authority of the courts of every state. The potential for interference with federal policy is plain, and supports this Court's review.

D. The Decision Below Is Incorrect

This Court's review is also warranted because the decision below is mistaken, and if not corrected, will permit the courts of New Jersey to assert jurisdiction beyond constitutional limits.

1. The Appellate Division was wrong to hold that mere "knowledge" of potential harm is sufficient for jurisdiction. App. 13. First, the facts of *Calder* do not support the view that mere knowledge suffices. *IMO Indus.*, 155 F.3d at 261 (noting that *Calder* "cannot be severed from its facts" and observing that the forum in *Calder* was the "focal point" of both the tort and the harm). Second, reading *Calder* expansively either puts it in conflict with this Court's other decisions rejecting mere "foreseeability" as sufficient for jurisdiction, *see World-Wide Volkswagen*, 444 U.S. at 295-297, or creates an unexplained and unjustified difference in treatment between "verbal torts" (such as the fraud alleged here or the libel alleged in *Calder*) and torts that actually cause physical injury. *See World-Wide Volkswagen*, 444 U.S. at 295-297; *Asahi*, 480 U.S. at 112; *cf.* Condlin, *supra*, at 95 (noting apparent difference in treatment of "foreseeability" in *Asahi* and *Calder*). Finally, even if those courts that have read *Calder* expansively have the right reading of *Calder*, the decision below takes things even a step further, by dividing up an undifferentiated tort (one allegedly against all of Qwest's investors) into multiple torts, each apparently "aimed" at each investor and

actionable "wherever" the investor was harmed. *See* App. 16 ("There is no authority for the proposition that jurisdiction grounded on such conduct is defeated because there may be another, similarly situated and targeted victim in a different forum."). Unlike the plaintiff in *Calder*, who was the single and unique focus of the tort, *see* 465 U.S. at 789-790, the respondent here is not distinct from the mine run of Qwest investors; what the Appellate Division calls "target[ing]" of the respondent is actually Qwest's failure to refuse the respondent's "request[] to receive information" sent generally to investors. App. 15. If this is properly called "targeting," it is impossible to distinguish from the "unfocused negligence" discussed in *Calder*. *See* 465 U.S. at 789.

2. The Appellate Division was also wrong to spackle over Mr. Anschutz's lack of contacts with New Jersey with contacts borrowed from alleged co-conspirators. App. 16. The conspiracy theory of jurisdiction cannot be reconciled with this Court's repeated holdings that a non-resident's contacts with the forum must be assessed individually. *Rush*, 444 U.S. at 332; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) (same). Applying a conspiracy theory to the directors of a public corporation is especially troubling, as it is easy to describe anything that happens in the corporation as a "conspiracy," and proceed immediately to the conclusion that jurisdiction is proper because conspiracy has been alleged. *See* App. 16-17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DOCKET NO. A-2505-04T1
A-2511-04T1

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER JOHN E. McCORMAC,

Plaintiff-Respondent,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOSEPH P. NACCHIO, STEPHEN M. JACOBSEN, DRAKE S. TEMPEST, MARC B. WEISBERG, JAMES A. SMITH, AFSHIN MOHEBBI, LEWIS O. WILKS, CRAIG D. SLATER and ARTHUR ANDERSON, LLP

Defendants,

and

ROBERT S. WOODRUFF and ROBIN R. SZELIGA,

Defendants-Appellants.

APPROVED FOR PUBLICATION

August 18, 2006

APPELLATE DIVISION

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, by TREASURER JOHN E. McCORMAC,

Plaintiff-Respondent,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOSEPH P. NACCHIO, STEPHEN M. JACOBSEN, DRAKE S. TEMPEST, MARC B. WEISBERG, JAMES A. SMITH, AFSHIN MOHEBBI, LEWIS O. WILKS, CRAIG D. SLATER AND ARTHUR ANDERSEN, LLP

Defendants,

and

PHILIP F. ANSCHUTZ,

Defendant-Appellant.

Argued November 16, 2005 – Decided August 18, 2006

Before Judges Stern, Grall and Lihotz.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, L-3738-02.

David Cook argued the cause for appellant Robert S. Woodruff (McCarter & English; Mr. Cook, Wesley R. Powell (Clifford Chance US), of the New York bar, admitted pro hac vice, attorneys; Mr.

Powell, of counsel; Joseph T. Boccassini, on the brief).

Thomas V. Reichert (Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg), of the California bar, admitted pro hac vice, argued the cause for appellant Robin R. Szeliga (McCarter & English; Mr. Reichert, Mark T. Drooks (Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg), of the California bar, admitted pro hac vice, attorneys; Mr. Reichert and Mr. Drooks, of counsel; Joseph T. Boccassini, on the brief).

Michael J. Hoffman (Holme Roberts & Owen), of the Colorado bar, admitted pro hac vice, argued the cause for appellant Philip F. Anschutz (McCarter & English; Mr. Hoffman, Bruce F. Black (Holme Roberts & Owen), of the Colorado bar, admitted pro hac vice, and Neil M. Gorsuch (Kellogg, Huber, Hansen, Todd & Evans), of the District of Columbia bar, admitted pro hac vice, attorneys; Mr. Hoffman, Mr. Black and Mr. Gorsuch, of counsel; Joseph T. Boccassini, on the brief).

Todd S. Collins (Berger & Montague) of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent (Sterns & Weinroth and Mr. Collins, Merrill Davidoff and Ellen T. Noteware (Berger & Montague), of the Pennsylvania bar, admitted pro hac vice, attorneys; William J. Bigham, Nancy Axelrod, Mr. Davidoff and Ms. Noteware, of counsel; Mr. Bigham, on the brief).

The opinion of the court was delivered by

GRALL, J.A.D.

This appeal arises from an action commenced by the State of New Jersey, Department of Treasury, Division of

Investment (NJT) to recover damages allegedly sustained as a consequence of a civil conspiracy to induce investments in stock issued by Qwest Communications International, Inc. (Qwest) through a series of fraudulent misrepresentations. We granted three individual, nonresident defendants, Philip E. Anschutz, Robert S. Woodruff and Robin R. Szeliga (collectively defendants), leave to appeal from an order denying their motions to dismiss for want of personal jurisdiction.[1]

While defendants are not New Jersey residents and do not have continuous and systematic contacts with this State sufficient to permit an exercise of general jurisdiction, we conclude that NJT has established a "relationship among [each] defendant, the forum, and the litigation" that is sufficient to permit exercise of personal jurisdiction. *Lebel v. Everglades Marina, Inc.,* 115 *N.J.* 317, 323, 327 (1989) (quoting *Shaffer v. Heitner,* 433 *U.S.* 186, 204, 97 *S. Ct.* 2569, 2579, 53 *L. Ed.* 2d 683, 698 (1977)). The exercise of specific jurisdiction is based on defendants' "intentional act[s] calculated to create an actionable event in [this State]," – *i.e.,* the intentional dissemination of false information "expected or intended to cause injury in New Jersey." *Blakey v. Continental Airlines, Inc.,* 164 *N.J.* 38, 67 (2000).

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[1] By order dated January 26, 2005, we consolidated the appeal filed by Szeliga and Woodruff (A-2505-04) with the appeal filed by Anschutz (A-2511-04) and with an appeal filed by NJT from a separate interlocutory order granting a motion to dismiss filed by defendant Arthur Andersen, LLP (A-2503-04). We now de-consolidate NJT's appeal (A-2503-04), which we address in a separate decision. *State of New Jersey v. Qwest Comm. Int'l, Inc.,* ___ *N.J. Super.* ___ (App. Div. 2006).

The following facts relevant to specific jurisdiction are drawn from the pleadings and the evidential materials submitted on the motion to dismiss. *See Blakey, supra,* 164 *N.J.* at 71-73; *Lebel, supra,* 115 *N.J.* at 324. The judge took no testimony, and there are no findings based on credibility to which we owe deference. *See Rova Farms Resort, Inc. v. Investors Ins. Co.,* 65 *N.J.* 474, 484 (1974). As defendants acknowledge, our review is de novo.

NJT alleged that between April 1, 1999 and December 3, 2001, it purchased seven million shares of common stock issued by Qwest at prices that were artificially inflated through a civil conspiracy to defraud investors by misrepresenting earnings and assets in public statements, press releases, SEC filings and conference calls with investors in which a representative of NJT participated. Qwest has since restated earnings for the relevant years and announced its intention to provide additional restatements.

NJT's complaint details the dates and contents of misleading statements and correlates those dates with the dates of large purchases of Qwest stock made by NJT. The complaint also recites transactions involving shares of stock in Qwest from which the individual defendants turned a profit and diminished the potential for loss of their personal wealth, through public sale or, in Anschutz's case, hedging transactions and a sale of the Anschutz Company's stock in Qwest to Bell South.

None of the individual defendants disputed signing the documents or making statements attributed to them in releases and filings. Nor do they dispute NJT's history of stock purchases or their individual acquisitions or sales of Qwest stock.

Anschutz became involved in Qwest before its stock was publicly traded. He owned 100% of the stock in the Anschutz Company. The Anschutz Company owned SP Telecom. SP purchased Qwest, and adopted its name. After that purchase, the Anschutz Company owned 100% of Qwest. Anschutz was a chairman of Qwest and a member of its executive committee at all relevant times.[2]

In fall 1996, when Qwest was considering a public offering of its stock, Anschutz met with Joseph P. Nacchio at Teterboro Airport in New Jersey. They discussed Nacchio's joining Qwest as its CEO. An agreement was reached under which Qwest opened offices in New Jersey and Nacchio worked from New Jersey, subject to the condition that he could be required to work in Colorado up to four days per week. Nacchio spent significant time in Colorado but also worked in New Jersey. Nacchio was in regular contact with Anschutz, whom he consulted on every major decision confronting him as CEO of Qwest. During Nacchio's tenure, Qwest traded its stock publicly. After the initial public offering, the Anschutz Company owned about 85% of the shares.

Woodruff was Qwest's CFO and Vice President of Finance when Nacchio took over as Qwest's CEO, and he stayed with Qwest until March 2001. Woodruff reported to Nacchio. He was responsible for treasury and finance. In addition, after Qwest went public, it added internal audit and investor relations divisions, both of which reported to the CFO. Woodruff had responsibility for SEC filings,

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[2] The record is less than clear on the proper title of Anschutz's businesses – Anschutz Corporation or Anschutz Company and SP Construction or SP Telecom – but there is no dispute about the ownership or relevant transaction.

which he signed after they were prepared by staff under his supervision. He involved outside auditors as he deemed appropriate. The investor relations division communicated with shareholders and the investment community; press releases and SEC filings were sent to investors who requested information. Woodruff reviewed releases about earnings that were disseminated to the press and investors. A representative of NJT received that information in New Jersey. Information about holders of significant blocks of Qwest stock was available to him, "if [he] needed it." He denied knowing that NJT was a significant holder of Qwest stock.

In 1999 Qwest took steps in preparation for a merger with U.S. West and completed that merger in June 2000. A release sent to NJT and other investors by Qwest quoted Nacchio's expression of pleasure with Qwest's progress and Woodruff's characterization of the report as reflective of Qwest's "continued momentum" and "strong revenue growth." The release was sent to NJT in New Jersey in June 1999. In early July 1999, NJT acquired 150,000 shares of Qwest stock for $5.13 million. Qwest issued additional positive statements quoting Anschutz and Woodruff, and Woodruff signed additional filings in July and August of 1999. During those months, NJT purchased an additional 97,000 shares at a cost of $2.14 million. On October 27, 1999, Qwest announced record high quarterly revenues, in excess of one billion dollars in the most recent quarter. Releases and filings reporting dramatic increases continued through June 30, 2000, when U.S. West merged into and became part of Qwest. On July 3, 2000, NJT acquired 3,122,746 shares of Qwest stock for $161.6 million. On July 21, 2000, Nacchio sold 100,000 shares of his stock in Qwest.

Positive reports about Qwest's prospects were repeated in filings and releases after the merger. In December 2000 Qwest issued a press release to assure investors that it was not experiencing the difficulties its competitors were encountering and would meet expectations. In February 2001, Nacchio announced his confidence in Qwest's ability to meet its announced revenue goals. By that time NJT had purchased additional stock in Qwest well in excess of one million shares.

Qwest's earnings were overstated. This was accomplished through a scheme involving the sale and repurchase of capacity on its network ("IRUs" or "indefeasible rights of use") and the false reporting of those "swap" transactions. Expenses for equipment were also falsely stated. For example, as a consequence of a series of transactions with KMC Telecom Holdings (KMC), Qwest purchased equipment and sold that equipment to KMC. Qwest reported the sales as revenue; KMC financed the equipment and reported the debt. Qwest then paid KMC for use of the equipment. KMC is based in New Jersey. Woodruff acknowledged that he approved the restructuring of accounting concerning KMC receivables, but denied approving the original structuring. Earnings statements throughout the relevant period were based on similar reporting of similar transactions.

NJT alleges that Qwest's dealings with Tellium, which is another New Jersey based business, included an illegal "swap" transaction. Anschutz approved another agreement through which Qwest officers and employees obtained shares of stock in Tellium. NJT claims that there is a connection between these transactions.

Woodruff traveled to New Jersey less than a handful of times on business. He attended one meeting at Nacchio's New Jersey office at which the management team put together a budget for the upcoming year and another meeting that was held to prepare for the "earnings release process." Nacchio attended both meetings. Anschutz did not attend.

Woodruff also went to New Jersey on behalf of KPN Qwest, a joint venture between Qwest and a Dutch telephone company. KPN Qwest was issuing high-yield debt, and the purpose of Woodruff's trip was to attract investors.

Woodruff left Qwest in March 2001, and Szeliga took over as acting CFO. She was named CFO on April 18, 2001. Prior to assuming Woodruff's responsibilities, Szeliga's duties included providing information to the investor relations group that reported to Woodruff. Szeliga saw "technical accounting opinions from [their] controllers group and from [their] auditors on how to account for [the KMC sales] and concurred with their reasoning and suggestions for the accounting for KMC." The investor relations division continued to provide releases, and notice of filings and investor-conference calls to NJT in New Jersey during Szeliga's tenure. Although purchases and sales of large blocks of stock by institutional investors were mentioned to her, Szeliga did not recall any mention of NJT. Like her predecessor, she signed SEC filings and approved releases that were transmitted to NJT.

On June 20, 2001, Morgan Stanley issued a report identifying suspected accounting irregularities in Qwest's financial statements. On the same day, Nacchio and Szeliga defended Qwest's reports and accounting methods on a conference call with investors. A representative of

NJT participated in that call from New Jersey. Notice of that call was given to him by email received in New Jersey. On the same day Qwest also issued a press release confirming that it expected to meet its projections. On June 21, 2001, Szeliga reiterated Qwest's position in a statement filed with the SEC.

On July 25, 2001, Morgan Stanley issued a second report questioning Qwest's "swap" transactions. On August 21, 2001, Wolfe, head of the investor relations division, wrote to Nacchio and Szeliga and enclosed a list of institutional shareholders in descending order. The cover memo explained the pattern of investors' sales of Qwest stock between August 1 and 7, 2001. Wolfe noted that there were exceptions to the general patterns "depending on what they [the investors] believe about Qwest's story." On October 30, 2001, Qwest filed a registration statement with the SEC that incorporated earlier filings. It was signed by Nacchio, Szeliga and Anschutz.

On December 13, 2001, Qwest issued a release denying rumors about its improper recognition of the KMC transactions. That release quoted Szeliga. In late 2001 and early 2002, the Anschutz Company divested itself of a significant number of its shares in Qwest through hedging transactions and a sale to Bell South.

The foregoing evidence and reasonable inferences therefrom permit exercise of jurisdiction. New Jersey's long-arm rule permits courts to exercise personal jurisdiction to the fullest extent allowed under the United States Constitution. *See R.* 4:4-4(b)(1); *Avdel Corp. v. Mecure,* 58 *N.J.* 264, 268 (1971). While the basis for exercise of personal jurisdiction may be either general or specific, *Waste Mgmt., Inc. v. Admiral Ins. Co.,* 138 *N.J.* 106, 119 (1994),

cert. denied sub nom., WMX Tech., Inc. v. Canadian Gen. Ins. Co., 513 *U.S.* 1183, 115 *S. Ct.* 1175, 130 *L. Ed.* 2d 1128 (1995), there is no question that this case requires a basis for exercise of specific jurisdiction over the individual defendants, which is dependent upon the relationship of each with this State and this litigation. *Lebel, supra,* 115 *N.J.* at 323; *see Waste Mgmt., supra,* 138 *N.J.* at 127. Our courts "evaluate the minimum contacts of a defendant [essential for specific jurisdiction] on a case-by-case basis." *Blakey, supra,* 164 *N.J.* at 66 (quoting *Waste Mgmt., supra,* 138 *N.J.* at 122). When the plaintiff establishes sufficient minimum contacts, which is the first prong of a two-prong test, the burden shifts to the defendant to show that exercise of jurisdiction would offend "traditional notions of fair play and substantial justice," *Lebel, supra,* 115 *N.J.* at 327-29, which is the second prong of the test. Defendants' argument on appeal is limited to the first prong of this test for specific jurisdiction.

Fraudulent communications are at the center of this controversy. NJT's claims are based on its assertion that it was injured as a consequence of intentionally false statements about the financial health of Qwest that were disseminated in this State and upon which NJT relied in investing public funds. The case is not about advertising a product that subsequently causes an injury that is unrelated to the communication. The crux of the cause of action is the dissemination of fraudulent statements into this State that caused harm to NJT here.

The New Jersey Supreme Court has addressed specific jurisdiction in cases centered on intentional torts based on wrongful communications on two occasions, and in both instances the Court has made it clear that an intentional communication of information with knowledge

or purpose that it will cause harm in this State suffices to establish the requisite minimum contacts. *Blakey, supra,* 164 *N.J.* at 69 (discussing defamation); *Lebel, supra,* 115 *N.J.* at 326-27 (discussing fraudulent statements).

In *Lebel,* the Court reasoned: "Where a defendant knowingly sends into a state a false statement, intending that it should then be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state." *Id.* at 326 (quoting *Vishay Intertechnology, Inc. v. Delta Int'l Corp.,* 696 *F.*2d 1062, 1066 (4th Cir. 1982)). The Court held that New Jersey had specific jurisdiction in a case involving fraud in the sale of a boat to a New Jersey resident by a Florida company. *Id.* at 320-21, 324-26. With respect to communications, the Court made it clear that it is not the fact or frequency of the communication but its relationship to the cause of action that is relevant. *Id.* at 325-26 (noting that the "nature of the contact" rather than the transmittal of the message was critical and stressing "that in this case it is alleged that the defendant's representations via mail and telephone to New Jersey were fraudulent"). As in *Lebel,* the fact that this litigation is centered upon fraudulent communications is critical in the analysis of the significance of the dissemination of the information to NJT in this State.

Similarly, in *Blakey* the Court held that the question of specific jurisdiction over individual defendants alleged to have made defamatory and retaliatory statements was whether that harassment was expected or intended to cause injury in New Jersey. 164 *N.J.* at 68. In this case, as in *Blakey,* the gravamen of the conduct alleged is the communication disseminated to NJT in this State. The Court further explained that where actionable harm is caused in this State, "'[t]he fact that the actions causing

the effects in [New Jersey] were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising from those effects.'" 164 *N.J.* at 67-68 (quoting *Calder v. Jones,* 465 *U.S.* 783, 787, 104 *S. Ct.* 1482, 1485, 79 *L. Ed.* 2d 804, 810 (1984)). The Court concluded that where actionable communications are at issue, the question is "whether the [communication] was expected or intended to cause injury in New Jersey" – *i.e.,* whether the statements were issued "with knowledge or purpose of causing harm to plaintiff [in this State]." *Id.* at 67.

Neither *Lebel* nor *Blakey* establish a new rule of law governing specific jurisdiction in cases involving tortious communications. Both cases rely upon decisions of the United States Supreme Court involving actions for libel. *Blakey, supra,* 164 *N.J.* at 67; *Lebel, supra,* 115 *N.J.* at 323. In *Keeton v. Hustler Magazine, Inc.,* 465 *U.S.* 770, 775, 104 *S. Ct.* 1473, 1478, 79 *L. Ed.* 2d 790, 798 (1984), the Court held that regular circulation of a magazine in the forum state was sufficient to establish personal jurisdiction in a libel case. In *Calder, supra,* 465 *U.S.* at 789, 104 *S. Ct.* at 1486, 79 *L. Ed.* 2d at 811-12, the Court held alleged intentional, libelous conduct in Florida "expressly aimed at California" was sufficient to permit California's exercise of jurisdiction. In *Waste Mgmt., supra,* 138 *N.J.* at 126, the New Jersey Supreme Court explained the rule established in *Calder:* "An intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor." We read *Blakey* and *Lebel* to hold that action with the knowledge or intention of causing harm within this State satisfies the role of the "'purposeful availment' requirement [of minimum contacts jurisprudence, because it] ensures that a defendant will

not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Blakey, supra,* 164 *N.J.* at 67 (quoting *Burger King Corp. v. Rudzewicz,* 471 *U.S.* 462, 475, 105 *S. Ct.* 2174, 2183, 85 *L. Ed.* 2d 528, 542 (1985)); *see also IMO Indus., Inc. v. Kiekert AG,* 155 *F.*3d 254, 260 (3d Cir. 1998) (noting that an intentional tort "may suffice to enhance otherwise insufficient contacts with the forum").

Defendants correctly note that the actions and knowledge of each of them must be considered individually not in the aggregate. *Waste Mgmt., supra,* 138 *N.J.* at 127. Woodruff, Szeliga and Anschutz all signed filings with the SEC that included allegedly false statements that induced NJT to purchase and hold Qwest stock. NJT received in New Jersey specific notice of those filings and accompanying press releases from Qwest's investor relations division that included statements from all three defendants. The approval of such statements and the system for their dissemination by the investor relations division is sufficient to give rise to an inference that each of these defendants recognized that investors would rely upon them. *See Derensis v. Coopers & Lybrand Chartered Accountants,* 930 *F. Supp.* 1003, 1014 (D.N.J. 1996) (discussing jurisdiction in New Jersey over officers of a Canadian company and apparently relying on status as a "controlling person" under 15 *U.S.C.A.* § 78t(a)); *cf. City of Monroe Employees Ret. Sys. v. Bridgestone Corp.,* 399 *F.*3d 651 (6th Cir.) (dismissing claim against foreign national on grounds of reasonableness under the circumstances and declining to exercise jurisdiction based on status of "controlling person" under those circumstances), *cert. denied,* ___ *U.S.* ___, 126 *S. Ct.* 423, 163 *L. Ed.* 2d 322 (2005). The dissemination to NJT, an institutional investor of public funds, was

accomplished through a division of Qwest established for the very purpose of addressing questions and concerns of investors. There is a basis for an inference that Anschutz, Woodruff and Szeliga were aware of this system for dissemination and expected it to have an impact on the recipient-investors who were the targets, wherever they might be located.

With respect to Woodruff and Szeliga, there are additional bases for concluding that they were specifically aware that NJT was a major investor and would suffer particular harm. They oversaw the functions of the division of investor relations as well as the preparation of the financial information included in the various statements and releases. The investor relations division maintained lists of large investors. NJT appeared on that list; at one relevant point NJT was ranked among the top thirty-five institutional investors. A copy of that list was sent to Szeliga, and Woodruff acknowledged that he had access to information about top investors if he needed it. NJT received in New Jersey email notices and releases, including information filed with the SEC.

The communications with NJT as an investor were not fortuitous or wholly dependent upon NJT's actions, and the communications were the actions that NJT alleges caused harm. Defendants' argument that these communications were dependent upon NJT's action in requesting to receive information sent to investors overlooks the role of the Qwest investor relations division and the relevance of these statements to the harm alleged.

Defendants' reliance upon *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Assoc.*, 142 F.3d 26 (1st Cir. 1998), is misplaced. In that case, plaintiff attempted

to base jurisdiction on isolated communications peripheral to the conspiracy alleged, not on a fraudulent communication that was the wrong alleged. This case is more analogous to *Cody v. Ward,* 954 *F. Supp.* 43, 45-47 (D.Conn. 1997), in which the court held that oral misrepresentations directed specifically to the forum for the purpose of causing the recipient to purchase shares of stock were sufficient to permit exercise of specific jurisdiction in an action based on the fraud.

Defendants seem to argue that because other investors in other states also received the fraudulent information, the notices directed to NJT cannot be viewed as aimed at an investor in this State. We do not see how that diminishes the significance of the fact that the false statements were directed to NJT, a recipient-investor in this State. The question is whether this State was the focal point of a harm NJT suffered as a consequence of the intentional tort aimed at NJT in this State. *IMO Indus., supra,* 155 *F.*3d at 261, 265-66 (finding no basis for specific jurisdiction in state of plaintiff's principal place of business where tortious conduct was not directed at the plaintiff in that forum). There is no authority for the proposition that jurisdiction grounded on such conduct is defeated because there may be another, similarly situated and targeted victim in a different forum.

With respect to defendants' individual protestations of ignorance about transmissions to NJT, other courts have recognized that a "'conspiracy theory' of personal jurisdiction is based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.'" *Textor v. Bd. of Regents,* 711 *F.*2d 1387, 1392-93 (7th Cir. 1983) (quoting *Gemini Enter., Inc. v. WFMY Television Corp.,* 470

F. Supp. 559, 564 (M.D.N.C. 1979)); *see Miller Yacht Sales, Inc. v. Smith,* 384 *F.*3d 93, 102 n.8 (3d Cir. 2004) (Scirica, J., dissenting) (discussing imputation of jurisdictional contacts based upon conspiracy theory). In *Matsumoto v. Matsumoto,* 335 *N.J. Super.* 174, 180-85 (App. Div.), *aff'd and modified on other grounds,* 171 *N.J.* 110 (2000), we upheld the trial judge's conclusion that New Jersey had personal jurisdiction over a foreign national who interfered with the custody of a parent in this State. In so doing, we relied, in part, upon *Chiosie v. Chiosie,* 480 *N.Y.S.*2d 756, 757 (N.Y. App. Div. 1984). In that case the court held that tortious acts of co-conspirators in New York were sufficient to establish jurisdiction over a co-conspirator defendant who was a resident of New Jersey. *Ibid.*

In this case, the investor relations division was established under the supervision of Woodruff, Nacchio and, inferentially, Anschutz, and the division was given financial information by and then taken over by Szeliga. Each of the defendants made or signed statements disseminated to NJT through the investor relations division. An inference and imputation of knowledge that the investor relations division would transmit the false statements to investors who requested regular notification is available on these facts.

In addition to the dissemination of the fraudulent reports in this State, NJT alleges other overt acts in New Jersey in furtherance of the conspiracy that are directly related to and facilitated the production of the fraudulent statements. The structuring and reporting of equipment sales to KMC Telecom Holdings, a New Jersey based company, is one of the allegedly misstated transactions. Woodruff came to New Jersey in connection with the joint

venture, KPN Qwest. NJT alleges that Qwest overstated the worth of that joint venture. There is also evidence that Anschutz was involved in Qwest's dealings with Tellium, which NJT alleges included an illegal "swap" transaction that was not properly reported. These transactions, which were allegedly misrepresented in financial reports, were actions in this jurisdiction in furtherance of the conspiracy to defraud investors.

Under all of the circumstances, we cannot conclude that NJT failed to present evidence and reasonable inferences adequate to raise a factual issue on whether each of the individual defendants contributed to the dissemination of false information to NJT with the intention or expectation of causing harm to NJT as a recipient investor. We note that defendants have not presented an argument that addresses NJT's pleadings and proofs with respect to the individual counts of the complaint – *i.e.*, defendants' argument does not distinguish NJT's claims based on intentional fraud and civil conspiracy from claims based on negligence in reporting. For that reason we neither consider the issue nor foreclose reconsideration of jurisdiction on a claim-by-claim basis in the trial court.

As noted above, defendants present no argument on this appeal in connection with the "second prong" of the test for specific jurisdiction – "whether it would offend traditional notions of fair play and substantial justice to entertain the suit." *Lebel, supra,* 115 *N.J.* at 327. In order to obtain a dismissal on that basis, defendants must establish a "compelling case that the presence of some other considerations would render jurisdiction [based on their respective roles in dissemination of false information to NJT in this State] unreasonable." *Id.* at 328 (quoting *Burger King, supra,* 471 *U.S.* at 477, 105 *S. Ct.* at 2184, 85

L. Ed. 2d at 544, and identifying factors such as the burden on the defendant, the plaintiff's interest in obtaining relief, the interest of the forum state and the interstate judicial system's interest in efficient resolution of controversies).

We see no basis for finding offense to traditional notions of substantial justice and fairness by entertaining this action to recoup significant public funds lost as a consequence of reliance on the alleged false statements transmitted to NJT in this State. In this connection, Nacchio's presence in New Jersey as CEO of Qwest cannot be overlooked. Nacchio was at the center of the conspiracy to misstate earnings; NJT's complaint contains numerous relevant statements attributed to him. He had offices in New Jersey from which he worked on a regular, albeit part-time, basis, and he had ongoing contacts with his subordinates Szeliga and Woodruff and his superior Anschutz. Woodruff attended a meeting with Nacchio in New Jersey, the topic of which was the release of earnings information at issue. The significant amount of NJT's investment and loss is also relevant to defendants' expectations about being haled into the courts of this State and the State's interest in providing a forum. *Lebel, supra,* 115 *N.J.* at 330 (discussing the relevance of the amount in controversy to the second-prong of the test for exercise of personal jurisdiction).

Defendants' argument on this appeal focuses on the trial judge's reliance on the stream of commerce theory of personal jurisdiction adopted by the Supreme Court in *Charles Gendler & Co. v. Telecom Equip., Corp.,* 102 *N.J.* 460 (1986). We do not read the trial judge's decision as fully dependent upon *Gendler,* and, in any event, our

determination of the legal questions is de novo, as defendants recognize.

The order is affirmed and the matter is remanded. We do not foreclose reconsideration of the question of personal jurisdiction over the individual defendants as the discovery on the individual claims proceeds. *See Blakey, supra,* 164 *N.J.* at 60, 71-73.

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STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, BY TREASURER JOHN E. McCORMAC, Plaintiff, v. QWEST COMMUNICATIONS INTERNATIONAL, INC.; PHILIP F. ANSCHUTZ; JOSEPH P. NACCHIO; ROBIN R. SZELIGA; ROBERT S. WOODRUFF; STEPHEN M. JACOBSEN; DRAKE S. TEMPEST; MARC B. WEISBERG; JAMES A. SMITH; AFSHIN MOHEBBI; LEWIS O. WILKS; CRAIG D. SLATER; and ARTHUR ANDERSEN LLP, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY DOCKET NO. MER-L-3738-02. Civil Action (Filed Dec. 3, 2004)

ORDER DISMISSING AMENDED COMPLAINT AGAINST CERTAIN DEFENDANTS FOR LACK OF PERSONAL JURISDICTION

THIS MATTER having been opened to the Court on application of McCarter & English, LLP, attorneys for moving defendants Philip F. Anschutz, Robin R. Szeliga, Robert S. Woodruff, ~~Stephen M. Jacobsen~~, [w/drawn /s/ PSP] ~~Marc B. Weisberg~~, [w/drawn /s/ PSP] ~~James A. Smith~~, [w/drawn /s/ PSP] ~~Lewis O. Wilks~~, [w/drawn /s/ PSP] Craig D. Slater, and Afshin Mohebbi for an Order dismissing plaintiff's Amended Complaint for lack of personal jurisdiction; the Court having heard the arguments of counsel and having reviewed the papers submitted, and for good cause shown;

IT IS on this 3rd day of Dec, 2004,

ORDERED and ADJUDGED that plaintiff's Amended Complaint is hereby dismissed in its entirety as to defendants ~~Philip F. Anschutz, Robin R. Szeliga, Robert S. Woodruff, Stephen M. Jacobsen, Marc B. Weisberg, James A. Smith, Lewis O. Wilks,~~ Craig D. Slater [only /s/ PSP], ~~and Afshin Mohebbi for lack of personal jurisdiction.~~ [The motion is otherwise denied as to defendants: Anschutz, Szeliga, Woodruff, Mohebbi /s/ PSP]

/s/ Paulette Sapp-Peterson
J.S.C.
PAULETTE SAPP-PETERSON, P.J.C.V.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-3738-02
A.D.#_____

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, Plaintiff, v. QWEST COMMUNICATIONS INTERNATIONAL, INC., et al. Defendants.	)	TRANSCRIPT OF DECISION

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: December 3, 2004

BEFORE:

THE HON. PAULETTE M. SAPP-PETERSON, P.J.Cv.P

TRANSCRIPT ORDERED BY:

IRA J. BRANDENBURG, Litigation Paralegal
(Tompkins, McGuire, Wachenfeld & Barry, LLP)

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THE COURT: State v. Qwest and others. Docket Number L-3738-02. The Court conducted oral argument on these motions in July, I believe, 2004.

Initially, oral argument was conducted in June of 2003 and the Court adjourned the ultimate resolution of these matters and permitted jurisdictional discovery to be conducted.

This matter arises out of an action brought by the plaintiff, the State of New Jersey, against defendant, Qwest Communication (sic) and its executives and directors and its accounting firm, Arthur Andersen.

Plaintiff alleges that Qwest – Andersen, its outside auditing firm, and 11 of its most senior and influential officers and directors conspired to defraud the State by employing a variety of improper accounting and business practices and by issuing false and misleading statements about Qwest operations, revenue and profits for the purposes of fraudulently inflate share prices.

Plaintiff contends the result of Defendant's actions, New Jersey has sustained hundreds of millions of dollars in investment losses. A number of the individually-named defendants, namely Philip Anschutz, Robin Szeliga, Robert Woodruff, Steven Jacobson, Marc [3] Weisberg, Jane Smith, Lewis Wilks, Craig Slater and Afshin Mohebbi now seeking to order wanting dismissing the facts against each of them for lack of personal jurisdiction.

Neither Qwest nor Arthur Andersen contest personal jurisdiction in this matter. Nor does Joseph P. Nacchio, Qwest Chairman and CEO, from April of 1999 to June 17th, 2002 who resided in New Jersey.

While, of course, decision was pending, the Court was notified that the plaintiff has agreed to dismiss without prejudice its claims against Jane Smith, Lewis Wilks, Stephen Jacobsen and Marc Weisberg.

Therefore; this decision will address whether personal jurisdiction exists as to Philip Anschutz, Robin Szeliga, Robert Woodruff, Craig Slater and Afshin Mohebbi.

Philip Anschutz is Qwest founder and controlling shareholder and a corporate director who previously presided over Qwest Corporate Board. Plaintiff contends that Anschutz holds an ownership interest in New Jersey and a New Jersey Professional Team, the New Jersey MetroStars, a pro soccer team. Moreover, Anschutz is actively seeking assistance from New Jersey's government to help fund the stadium in Harrison, New Jersey, for the team.

[4] Plaintiff contends that Anschutz fails to mention in his certification that he formerly employed Nacchio – that he formally employed Nacchio in New Jersey. Plaintiff points to an article and states Anschutz flew to New Jersey to hire Nacchio and to seek his resignation. See Anthony Effinger, The Secrets of Philip Anschutz Bloomberg Markets, November 2002 at 46, Exhibit 1 to the certification of Michael D'Angelo.

Anschutz submits a further certification stating plaintiff's allegation that he personally owns the New Jersey MetroStars is false. Anschutz certifies that the MetroStars are owned by Anschutz New York Soccer Incorporated, a Colorado corporation. Anschutz New York Soccer Incorporated is a wholly-owned subsidiary of Anschutz Entertainment Group Incorporated, a Colorado Corporation. Anschutz Entertainment Group Incorporated

is a wholly-owned subsidiary of Anschutz Company and that's a corporation incorporated in Delaware. He owns – the defendant Anschutz owns all of the stock of the Anschutz Company.

Anschutz' certification indicates that he's a resident of Colorado. He's never lived in New Jersey, was not served in New Jersey, he's never filed income taxes in New Jersey, owns no property in New Jersey and leases no property in New Jersey. He states that he [5] has no bank accounts in New Jersey, no telephone in New Jersey and no office in New Jersey. He does not advertise in New Jersey and does not employ anyone in New Jersey. Defendant states he did not participate in the June 20th, 2001 conference call referred to in the complaint in this action. He states that he's never met with William Trent at any location.

Robin Szeliga served as Qwest Executive Vice President, Finance and Chief Financial Officer since April 2001. From October 1999 to March of 2001 Szeliga was Senior Vice President of Finance. Szeliga is a certified public accountant.

Plaintiff alleges in the complaint in Paragraph 33 that fraudulent statements were made by Nacchio and Szeliga during an analyst conference call on or about June 20th, 2001 in which a New Jersey representative participated and relied upon representations made during that conference call. That is, William Trent, who is the State's designated representative and manager toward this investment portfolio.

At Paragraph 3 of her certification, Robin Szeliga admits that she conducted business in New Jersey on Qwest's behalf visiting the State twice and stayed several days in the state.

[6] Plaintiff contends that she did not disclose her business contact and what communication she made in New Jersey.

Szeliga states in the certification that she had been an employee of Qwest since November of 1997, that she's a resident of Colorado and has been a resident of Colorado for more than ten years, has never lived in New Jersey, has never filed income taxes in New Jersey, owns no property in New Jersey and leases no property in New Jersey. She states that she has no bank accounts in New Jersey.

Defendant states that she did not meet any of the representatives of the State of New Jersey or the plaintiff in this action, representatives of the State of New Jersey, specifically, William Trent or any other representatives of the Plaintiff, nor has she contacted any representative of the plaintiff in this action in order to solicit the purchase or sale of securities for any other purpose.

Robert Woodruff is a Qwest Director and Executive Vice President of Finance, Chief Financial Officer and Treasurer of Qwest. It was in 1997. Paragraph 14 of his certification states that he traveled to New Jersey for meetings in New Jersey. He does not disclose the frequency of the travel. The [7] purpose for who he engaged in dealings with that is KMC or Global Crossing.

Woodruff states he is a resident of Colorado, was employed by Qwest from February of 1997 to March 2nd, 2001. He has never lived in New Jersey, was not served in New Jersey, has never filed income taxes in New Jersey, owns no property in New Jersey and leases no property in New Jersey. He states he has not bank accounts in New Jersey, no telephone in New Jersey and no office in New

Jersey. He does not advertise in New Jersey and does not employ anyone in New Jersey.

Defendant Woodruff states that he did not participate in the June 20th, 2001 conference call referred to in the complaint in this action. He states that he has never met with the plaintiff's representative, William Trent, at any location.

Craig Slater, a Qwest Director, serving on the Board's Compensation Committee and Executive Committee.

Slater states he is a resident of Colorado. Slater states – Slater's date of hiring by Qwest is unclear. He states that he conducts no business in New Jersey. He states that he's never met with William Trent in any location. And he states that he did not participate in the June 20, 2004 (sic) conference call. [8] He certifies that he did not sign Qwest registration statements or any of the other SEC filings and documents described in the complaint.

He indicates that he is a resident of Colorado, he's never lived or held permanent employment in New Jersey, was not served in New Jersey, has never filed income taxes in New Jersey, owns no property in New Jersey, and leases no property in New Jersey. He states that he has no bank accounts or other assets in New Jersey, no telephone listing in New Jersey, or office in New Jersey. He does not advertise in New Jersey. He does not employ anyone in New Jersey. He certifies that he has no business interest in New Jersey. He conducts no business here.

He also certifies that he had no personal meetings with the plaintiff about Qwest. He's never called the plaintiff about Qwest, written plaintiff about Qwest, faxed

plaintiff about Qwest, sending documents to plaintiff about Qwest or communicated.

Similarly, Afshin Mohebbi who joined Qwest in 1999 also contends that he has no contacts with this forum for which any jurisdiction, whether general or specific should attach.

The defendants contend that this Court does not have personal jurisdiction over them because [9] plaintiff failed to establish personal jurisdiction in their complaint. Defendants claim that New Jersey does not allege any facts showing any of the moving defendants knowingly directed any of the allegedly false statements into New Jersey. According to defendant, New Jersey sought out statements made by the moving defendants in other jurisdictions not New Jersey. New Jersey's unilateral decision to rely on the statements made in other jurisdictions in making investment decisions does not lawfully entitle them to hail [sic] the moving defendants into court in this jurisdiction on any claim related to New Jersey's purchases.

None of the certifications submitted by defendants indicating statements, false or otherwise, were directed intentionally or just directed into New Jersey by defendants in any way related to this lawsuit. Defendants, therefore, argue that plaintiff cannot establish personal jurisdiction over them and the complaint must be dismissed as to these defendants.

Plaintiff maintains that the moving defendants along with Qwest's then CEO Nacchio, proceeded to implement the scheme to artificially inflate the share price of Qwest

stock by entering into [~~10~~] ~~sham~~ transactions and improperly accounting for those deals of the company's public financial statements.

According to plaintiff, a significant part of the scheme involved Qwest's participation and swap transactions with customers which appeared to substantially increase Qwest growth rate, revenues and earnings which, in fact, have no legitimate economic purpose. In these transactions, Qwest purportedly sold capacity on its optical telecommunications network to another carrier while simultaneously buying a nearly identical amount from the other carrier.

Plaintiff contends that such conduct violates generally accepted accounting principles and that Qwest recognized. revenue from the sale and booked the corresponding purchases at capital expenditure rather than operating cost.

Plaintiff alleges each of the individually-named defendants personally participated in profiting from the fraud. Collectively, plaintiffs allege that the individual defendants sold eleven million nine hundred three hundred fourteen shares of Qwest stock or 62 percent of their respective holdings or four hundred ninety million three hundred – I'm sorry – $490,003,760. Plaintiff contends that New Jersey purchased at least 4,000 shares of Qwest common [11] stock or in excess of $147 million between November 2000 and November 2001 and that New Jersey. purchased stock at prices as high as $54.40 per share, only later to hold the stock at a price of just over $1 per share.

On or after September 22nd, 2002 plaintiff contends that truth commits began to emerge and Qwest admitted to having committed accounting violations and that it

would reinstate nearly one billion in revenues previously recognized.

Plaintiff's complaint alleges that Qwest entered into hundreds of millions of dollars of sham transactions with Global Crossing, a limited liability corporation, and KMC Telecom Holdings, Incorporated. Both companies are headquartered in New Jersey. Plaintiff contends that these companies were a central part of the stock inflation subterfuge. The complaint contains four counts, three of which are relevant to the present motion, aiding and abetting fraud, negligent misrepresentation and breach of the fiduciary duty.

The moving defendants urge this Court to dismiss this complaint as to them for lack of jurisdiction because the jurisdictional discovery permitted by this Court unquestionably reveals that these defendants did not engage in any conduct for [12] which either specific or general jurisdiction may be imposed as to each of them.

Plaintiff contends that jurisdictional discovery permitted by this Court establishes personal jurisdiction over the moving defendants.

New Jersey's law on statutes extends to the outermost limits permitted by the due process clause of the United States Constitution, Rule 4:4-4; *Jacobs v. Walt Disney World Company* 309 N.J. Super. 443. There are two types of personal jurisdictions, specific and general; *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. 286.

Specific jurisdiction exists where defendants' activities are purposely directed to the form and the cause of action results from the alleged injuries that arise out of or relate

to those activities; *Helicopteros Nacchionales de Colombia v. Hall* 466 U.S. 408, 411.

The threshold requirement for specific jurisdiction is the concept of minimum contacts where there is some act by which the defendant purposely avails himself of the privilege of conducting activities within the foreign state, thus, invoking the benefit and protection of its laws; *Hanson v. Denckla* 357 U.S. 235, citing *International Shoe v. Washington*, [13] 326 U.S. 310, *Lebel v. Everglades Marina* 115 N.J. 317, where the New Jersey Supreme Court held that the minimum contacts required is satisfied so long as the contact resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff. The purposeful contact requirement ensures that the defendant will not be hailed [sic] into a jurisdiction solely as a result of random, fortuitous or attenuating contacts; *Lebel,* 115 N.J. 323.

In determining jurisdiction over a defendant, the Court should consider whether the defendant's conduct, in connection with the foreign state such that he or she should have reasonably anticipated being hailed [sic] into court there. One isolated act, however, may be sufficient to subject a defendant to the jurisdiction of the forum; *Gendler and Company v. Telecom Equipment Corp.* A non-resident who is not doing business as stated in the traditional sense may nonetheless be amenable to sue in that state where the interest in the contract will have significant effects; 258 N.J. at 272.

Of course, it has been held that the mere transmittal of telephone calls to a foreign state without more is insufficient to suppose – to impose personal jurisdiction; see *Lebel*, 115 N.J. at 325.

[14] General jurisdiction is assertive when the cause of action does not arise from or relate to the defendant's purposeful contact with the foreign state, but rather when there are continuing and systematic contacts between the non-resident defendant and the foreign state; *Gendler* 102 N.J. 478. This form of personal jurisdiction requires a plaintiff to show substantially more than near minimal contact to ensure that they are not subjecting a non-resident defendant to suit in the same manner as a resident of the forum; *Jacobs v. Walt Disney* 309 N.J. Super. at 452.

Thus, personal jurisdiction over the individually made defendant requires that this Court must find that the defendants purposely availed themselves of the privileges of conducting activities within the foreign state, or that their contacts were so continuous and systematic that they show substantially more than mere minimum contact, thus invoking the benefits and protections of this law. In weighing this efficiency of the contacts, the Court must consider whether the contact arose from the purposeful act of the foreign state or by the unilateral act of another party; *Waste Management et al. v. Admiral* at 138 N.J. 106.

For example, the New Jersey Supreme Court [15] found in the *Lebel* case that a Florida seller of luxury buildings became subject to New Jersey's jurisdiction when he telephoned his New Jersey buyer, mailed the sales contract to New Jersey and received payment from New Jersey.

The Court must, therefore, determine whether or not the specific facts supporting personal jurisdiction had been met as to each of the individually-named defendants.

When a party raises a defense of personal jurisdiction, it is the plaintiff who bears the burden of establishing that defendants' contact is sufficient to confirm personal jurisdiction. Plaintiff points to *Elbco v. Struggle* 989 F. Sup. [sic] 69 for the proposition of factual discrepancies created by affidavits are generally resolved in favor of the non-moving party. Against this backdraft the Court considers whether or not there are sufficient facts from which this Court can conclude that the plaintiff has met its burden of establishing personal jurisdiction over the individually-named defendants.

At the outset, this Court rejects the notion or the suggestion that, for purposeful conduct – for specific jurisdiction to the opposed, that the conduct must be specifically directed to New Jersey and literally directed to New Jersey physically. This [16] Court accepts that the conduct maybe directed to a number of foreign states – but if in – if the underlying intent or purpose of the conduct is directed to each forum, separate and independent of each other, the fact that conduct may have occurred in another state does not mean that it is not directed to – specifically directed to New Jersey.

In support of this position, the Court looks to the decision in *Gendler v. Telecom Equipment Corporation.* There, the Supreme Court, the opinion authored by Justice Pollock held that the stream of commerce theory supports the exercise of jurisdiction over non-resident manufacturer that knew, or reasonably should have known, of the distribution system through which its products were being sold in the foreign state.

The Court determined that, and I quote, "The stream of commerce theory by which a foreign corporation that

delivers its products into the stream of commerce is held to have fair warning that it will be subject to suits in those states where consumers purchase its products constitutes a basis for asserting personal jurisdiction over a non-resident defendant."

In the field of investment and stocks stocks clearly the offering – the offerings and the [17] registrations and the filings that are submitted are intended to attract investors and the investors are going to be state-wide or the investors will be both entities or persons throughout the various states and worldwide, for that matter. And so that the nature of the product, that being the stocks, are such that it is reasonable to anticipate just as it is reasonable to anticipate for a manufacturer that there will be widespread distribution of product, that product, in this case, being shares in Qwest.

And again to that backdrop the Court as respect to Philip Anschutz' general jurisdiction. Plaintiff claims Anschutz is subject to general jurisdiction because he owns 100 percent of the stock in the Anschutz' company, which in turn owns 100 percent of Anschutz Group Incorporated, which in turn owns 100 percent Anschutz New York Soccer Incorporated, which in turn wholly owns the New York/New Jersey MetroStars Professional Soccer Team.

Plaintiff asserts further that general jurisdiction is appropriate because Anschutz owns stock in a public company, Regal Entertainment Group that has 13 movie theaters in New Jersey. In the absence of evidence in Anschutz' personal contacts in New Jersey in connection with these entities, his stock ownership [18] in those

companies does not establish general jurisdiction; *Pfundstein v. Omnicom Group Inc.* 285 N.J. Super. 245

Plaintiffs also point to evidence in the record of Anschutz's regular travel to Teterboro Airport, repeated telephone contact with New Jersey and logging activities with State officials. Anschutz has asked this Court to disregard this evidence because upon closer examination, the so-called logging consisted of one meeting with the Governor of New Jersey initiated by the Governor of New Jersey, 25 telephone calls to New Jersey over the course of four years and 14 occasions during which he either stopped over or passed through New Jersey at Teterboro Airport during a four-year period; citing *Helicopteros Nacchionales de Colombia, S.A. v. Hall* at 466 U.S. 408, specifically Page 418, defendants argue that no court has ever found general jurisdiction based upon such isolated or sporadic contact.

Anschutz's certification indicates that he's a resident of Colorado, as the Court has noted, and that he has never lived in New Jersey, nor engaged in any conduct from which it could be concluded that his contacts with New Jersey have been so systematic and continuous as to support general jurisdiction. Thus, [19] based upon the Supreme Court's reasoning in *Helicopteros,* sporatic [sic] telephone calls from the stockholders a passenger stops at Teterboro Airport during a four-year period are insufficient to establish systematic and continuous contacts for purposes of asserting general jurisdiction.

With respect to specific jurisdiction, plaintiff states that Anschutz signed some of the regulatory filings at issue in the present litigation. His position as a Director of

Qwest and his direct dealings with Qwest CEO Defendant Nacchio has a basis for specific jurisdiction.

With respect to Nacchio, the record reveals that Anschutz personally recruited Nacchio in New Jersey, personally informed Nacchio in August of 1999 in a letter sent to Nacchio in New Jersey that Qwest was offering nine million Qwest stock options directly stock options to Chiacchio (sic) – Nacchio, I'm sorry. The record reveals that he directly supervised and rated Nacchio's performance and sent Nacchio's compensation while he worked – while Nacchio worked at the Qwest New Jersey office.

Nacchio himself testified before the United States Senate hearing into Qwest activities, but he regularly discussed every major decision confronting [20] Qwest. It is also noteworthy that Nacchio's contracts specifically permitted Nacchio to work out of the Qwest New Jersey office and it is clear from jurisdictional discovery that he spent considerable time in New Jersey at times working on behalf of Qwest.

On this evidence alone this Court finds sufficient prima facie evidence purposeful conduct directed to the State of New Jersey in connection with the acts and transactions which the claim derived. This Court does not find the fact that he recruited the Defendant Nacchio as evidence of purposeful conduct, but his involvement as a signatory and regulatory of filings, although they were not filed in New Jersey but they were filed with the SEC and his regularly – the fact that Nacchio regularly discussed every major decision confronting Qwest and the – and based upon the underlying allegations and the telephone calls and trips to New Jersey, the Court is satisfied that

that is sufficient on its face to invoke personal jurisdiction over Philip Anschutz based upon specific jurisdiction.

The additional evidence of the telephone calls, the trips to the New Jersey area during the relevant time period strengthens plaintiff's claim that Anschutz regular communication that Anschutz engaged in [21] regular communication with Nacchio.

Additionally, his signatures on the filings that took place during the period of time of the alleged complaint reports were being filed and released to the public, combined with what Nacchio described as discussions of every major business decision, convinces this Court that this is sufficient to invoke specific jurisdiction. That in so signing those regulatory documents, that he had to have known and he had to have expected, just as the manufacturer in *Gendler* had to expect, that he would be subject to suits in those states where the consumer of the product, that being the investors into Qwest shares made such investments.

It is not without note that to the extent that New Jersey invested millions, millions of dollars into Qwest shares that that called for funds being moved out of New Jersey to Qwest Corporation. And that was facilitated, as alleged, by the defendants – as alleged by the plaintiffs with – by the conduct of the defendants. The defendants would have to know by their conduct, if proved, that such conduct would be purposely directed to investors, particularly investors such as the State of New Jersey.

Robin Szeliga joined Qwest in 1998 as the Vice President of Finance and continued to serve in [22] that capacity through March of 2001. She became Chief Financial Officer in April 2001. Her responsibilities included signing

form 10Ks, AKs, overseeing investor relations activies [sic], as well as acting as a spokesperson for Qwest.

Jurisdictional discovery further revealed that she signed documents for SEC filings which purportedly contained false and misleading reports, issued a press release which contained statements attributed to her in response to a Morgan Stanley working report, about Qwest's accounting irregularities and participated in the June 20th, 2001 conference call with Qwest investors that included New Jersey's representative, William Trent, in which representations were made that New Jersey relied upon in making a decision to continue to purchase Qwest stocks.

She was also directly copied with information regarding Qwest top institutional investors. For example, in the document listing 132 of Qwest's top investors, the State of New Jersey was listed as number 33.

Additionally, she was briefed and copied on documents regarding alleged swap transactions between Qwest and KMC, a New Jersey-based corporation. Defendant Szeliga dismisses plaintiff's contentions as [23] a laundry list of unfocused incidental contact between Szeliga and New Jersey. This Court disagrees. The jurisdictional discovery reveals Szeliga's role as both Acting Chief Financial Officer and Chief Financial Officer was intimately involved in the day-to-day financial operations of Qwest beyond merely approving or signing regulatory filings.

Hence, this Court is satisfied the plaintiffs presented prima facie proof of conduct on her part, specifically directed to New Jersey to such an extent that she should have reasonably expected – that she should be subject to

personal jurisdiction in connection with the acts and transactions from which the claims arise.

Robert Woodruff was a Director of Qwest and Executive Vice President of Finance, Chief Financial Officer and Treasurer of Qwest from April 1997 to March 2nd, 2001. Between 1997 and 2001 he signed Form 10KQs, AKs, issued press releases touting Qwest's strong revenue position, directly reported to Defendant Nacchio and continued to make representations as to the margins of improvement of Qwest.

Additionally, he performed accounting and finance functions. And the accounting and finance functions reported directly to him. He traveled to New [24] Jersey to conduct Qwest business, including a visit to New Jersey to prepare Qwest's budget and to. prepare for the issuance of earnings releases according to jurisdictional discovery.

He also approved the restructuring of New Jersey-based KMC Telecom Holdings receivable to which Qwest – to which receivables to Qwest, a transaction which plaintiff claims is part of Qwest's sham transactions, a subject of the within action. These activities demonstrate prima facie evidence to conduct purposely directed to the forum from which it may be inferred. They arose in connection with the present allegations.

The Court continues to rely upon the *Gendler* case by the way of analogy that the problem question here are the shares of stock in Qwest and the fact that those shares are essentially distributed in the stream of commerce because there's an opportunity to invest in Qwest by persons from many jurisdictions.

And it is noteworthy that New Jersey was listed as – under – as a top investor and so clearly, all of the individuals who were executives and engaged in the day-to-day operations and decision making of Qwest had to anticipate that the system through which the shares – that the stock of Qwest was marketed. [25] That system is press releases, financial reports, SEC filings. That is the marketing basis upon which investors look to and rely upon. And so they had to expect that New Jersey would rely upon those representations.

And so this Court finds that by way of analogy is purposeful conduct directed to the foreign state and the fact that many states may have received this information does not, in any way, diminish the purposefulness of the conduct directed towards New Jersey.

Craig Slater has been a director of Qwest since 1987 and has served on Qwest Executive and Compensation Committees. He too signed financial statements and regulatory filings which plaintiff claims were transmitted to New Jersey. Plaintiff points to Slater's signing of regulatory filings as sufficient basis to exercise personal jurisdiction.

However, unlike Anschutz, Nachio [sic], Woodruff and Szeliga, jurisdictional discovery reveals no other involvement of filings other than what appears at this posture to be his pro forma signature, nor does the fact that he invested in New Jersey corporation Tellium, a basis to assert personal jurisdiction; see (indiscernible) Super. 285, NJ Super. at 252.

[26] The Court is not satisfied that jurisdictional discovery has disclosed sufficient facts to justify hailing

[sic] Craig Slater into New Jersey. And therefore the motion will be granted as to Craig Slater.

Afshin Mohebbi joined Qwest in 1999 and served as Chief Operating Officer. Plaintiff claimed that Mohebbi made many false and misleading representations to the State of New Jersey through SEC filings, press releases, financial statements that were disseminated to the plaintiff and relied upon by the plaintiff in making investment decisions.

The specific connote which plaintiff claims was directed to New Jersey involved the presentation made to investors in New York City in March 2001. After that presentation, Mohebbi met privately with to the plaintiff's representative William Trent in which he is alleged to falsely explain the Qwest large capital expenditures noted in the company's financial reports would result in the company's growth strategy. During his deposition, Mohebbi acknowledged that he spoke with Qwest CEO Defendant Nacchio when Nacchio was working out of New Jersey.

He was also involved with Qwest business dealings with New Jersey-based corporations KMC, [27] Teilean and Global Crossings. Corporations which plaintiff claims were allegedly involved in the sham transactions.

Finally, jurisdictional discovery also reveals the transmittal of several reports to Mohebbi which listed the plaintiff as one of the largest holders of Qwest stock. This Court concludes that these contacts were sufficient to invoke personal jurisdiction over Mohebbi. Hence, this Court is satisfied that plaintiff has presented prima facie proof of conduct on Mohebbi's part, specifically directed to

New Jersey in connection with the acts and the transactions from which the claims arise.

Therefore, the Court concludes, by way of summary, that the motions are denied as to all individually-named defendants – all individually named moving defendants except Craig Slater. The motion as to Craig Slater is granted.

Next is a motion by the defendant Arthur Andersen to dismiss for failure to state a claim the claim upon which release can be granted. This motion concerns Arthur Andersen's accounting activities.

The complaint identifies a single actual undertaking of Andersen during the relevant time period. Andersen issued its audit opinion on Qwest's [28] financial statements for the year 2000. The opinion was included in Qwest's 2000 10K.

Plaintiff alleges that Andersen served as Qwest's independent public accountants and auditors until May 29th, 2002 when it was replaced by KPMG, LLP. Additionally, plaintiff alleges that Andersen blessed Qwest's swap transactions and the improper accounting practices therein. Plaintiff alleges Arthur Andersen aided and abetted fraud and negligent misrepresentation.

Defendants Andersen contend that they have statutory – he has a statutory immunity to these claims. The negligent misrepresentation claim should be dismissed because plaintiff fails to allege with sufficient particularity that Andersen made any false statements upon which plaintiff relied and New Jersey courts do not recognize aiding and abetting fraud against accountants: In any case, plaintiff's allegations are insufficient. Plaintiff, in

reply, has dropped the negligent misrepresentation claim against Arthur Andersen.

Plaintiff contends, however, that the complainant states a claim against Arthur Andersen for aiding and abetting fraud under New Jersey law and N.J.S.A. 2A:53a-25 does not immunize Andersen from [29] liability for its intentional conduct.

The standard under which a motion to dismiss is decided is well-established in New Jersey; *F.G. v. MacDonell* 291 N.J. Super. 262. Trial court should approach with great caution applications for dismissal based on the failure of a complaint stated claim under Rule 4:6-2e.

The test for determining adequacy of the pleading is whether a cause of action is to justify the facts. The inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. First in the analysis plaintiffs are entitled to have a complaint searched in depth with literality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taking – printing markers, sharp electronics. Therefore, every reasonable inference will be given to the plaintiff and the motion will only be granted in those rare instances and generally without prejudice.

N.J.S.A., according to Arthur Andersen, 2A:53a-25 prohibits plaintiff from bringing this action against Arthur Andersen predicated on the Andersen's request of financial statements. The accountant liability statute in pertinent part revised, [30] notwithstanding the provision of any other law, no accountant shall be liable for damages for negligence arising out of, and in the course of rendering any professional accounting service unless,

(a) the claimant against the accountant was the accountant's client, or the accountant knew at the time of the engagement by the client or agreed with the client after the time of the engagement that the professional accounting service rendered to the client would be made available to the claimant who was specifically identified to the accountant in connection with a specified transaction made by the claimant, knew that the claimant intended to rely upon the professional accounting service in connection with that specified transaction, (c) directly expressed in the claimant by words or conduct the accountant's understanding of the claimant's intended reliance in the professional accounting service.

Plaintiff and defendant agree that the New Jersey Legislature created a statute in response to the New Jersey Supreme Court's decision in *H. Rosenbloom, Incorporated v. Adam* 92 N.J. 324. However, a plaintiff contends that the statute applies only to negligent acts by accountants and not cases of fraud or aiding and abetting fraud. Defendant relies upon *Finderne* [31] *Management Company v. Barrett* 355 N.J. Super. 197, arguing that the case clearly indicates the citation sponsored statement, that the Senate bill that the legislation enacted to limit accountant's liability of third parties for the accountant's negligent act. The bill restores the concept of privity between accountants and third parties as a condition preceding to imposition of liability.

Plaintiff cites *Garden Hire v. New Jersey Manufacturers,* an employment discrimination case, where the Court delineates the elements of a cause of action for aiding and abetting under the restatement.

However, the Court notes that in *Allegheny General Hospital v. Philip Morris, Incorporated,* 228 F.3d, the Third Circuit stated that aiding and abetting claims and conspiracy claims require an underlying tort cause of action. Here the underlying tort is a fraud committed by Qwest. If no fraud had been committed, there could be no claim for aiding and abetting, contrary to defendants' objection to the application of the three elements of aiding and abetting from the restatement. Not dispositive. I lost some pages.

(Tape off)

What is dispositive in this case is the [32] Supreme Court's decision in May of this year in *Dickerson* – in the *Dickerson* case where the – go off the record.

(Tape off)

– is the *Dickerson* case where the Supreme Court recently affirmed the Appellate Division decision and unanimously affirmed. In *Dickerson, the plaintiffs/ corporations owning and operating* supermarkets that were members or stockholders of Twin City Grocers Incorporated, a wholesale distributor of supermarket products. It was a cooperative organization serving the usual needs of its market members. Most of the individual owners of the supermarkets were also members of Twin City – Twin County Board of Directors. Twin County engaged Defendant Ernst & Young as its accountants to audit its books. The complaint alleged the annual audits were performed negligently for four years and as a result, failed to disclose that one of the directors perpetrated numerous frauds adversely affecting Twin County and the plaintiffs.

The Court concluded that the complaint neither alleged or applied satisfactorily any of the elements of the statute in Section B(2). Under the statute, the New – the State of New Jersey needs to [33] allege that Arthur Andersen was identified by the State with respect to a specific transaction. Nowhere in the complaint does the State of New jersey allege that Arthur Andersen was identified to them with regard to a specific transaction in compliance with N.J.S.A. 2A:53a-25-(5)(a) and (b), nor does the plaintiff comply with the requirements of b(2)(a) and (b). The accountant must know he thereafter must agree with the client that the work will be made available to a specifically identified claimant in connection with the specified transaction made by the claimant.

Further, the accountant must have known that the claimant intended to rely on the services in connection with the specified transaction. Thus, plaintiff has failed to plead the tort of aiding and abetting with requisite particularity and in effect has failed to state a claim against Andersen upon which relief may be granted.

For that reason, the sole remaining count against Andersen is hereby dismissed.

* * *

[34] CERTIFICATION

I, MARY L. POLITO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number CI 381-04 index number 1025 to 4308, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate

compressed transcript of the proceedings as recorded, and to the best of my ability.

Mary Polito
MARY L. POLITO

APPROVED BY:

Johanna LiMato
JOHANNA LiMATO AOC #179
J&J COURT TRANSCRIBERS, INC. DATE: 12/13/04

SUPREME COURT OF NEW JERSEY
M-542 September Term 2006
60,222

STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,
DIVISION OF INVESTMENT,
BY TREASURER
JOHN MCCORMAC,
Plaintiff-Respondent,
v.
QWEST COMMUNICATIONS
INTERNATIONAL, INC., et al.,
Defendants;
and
PHILIP F. ANSCHUTZ,
Defendant-Movant,
and
ARTHUR ANDERSEN; LLP,
Defendant-Respondent.

ORDER
(Filed Dec. 8, 2006)

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable James R. Zazzali; Chief Justice, at Trenton, this 5th day of December, 2006.

/s/ [Illegible]
CLERK OF THE
SUPREME COURT

The foregoing is a true copy of
the original on file in my office.

/s/ [Illegible]

CLERK OF THE SUPREME
COURT OF NEW JERSEY

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State of New Jersey, Department of Treasury, Division of Investment, by Treasurer John E. McCormac,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY
Plaintiff,	DOCKET NO. L-3738-02
-against-	CERTIFICATION OF PHILIP F. ANSCHUTZ IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION
Qwest Communications International, Inc.; Philip F. Anschutz; Joseph P. Nacchio; Robin R. Szeliga; Robert S. Woodruff; Stephen M. Jacobsen; Drake S. Tempest; Marc B. Weisberg; James A. Smith; Lewis O. Wilks; Craig D. Slater, and Arthur Anderson LLP,	
Defendants.	

Philip F. Anschutz, of full age, hereby certifies as follows:

1. I am a defendant in this action and have personal knowledge of the facts contained in this Certification.

2. I am a resident of Colorado.

3. I was not served with process in this case in New Jersey.

4. I own no property in New Jersey.

5. I lease no property in New Jersey.

6. I have no bank accounts in New Jersey, no telephone listings in New Jersey, and no office in New Jersey.

7. I do not advertise in New Jersey. I do not employ anyone in New Jersey.

8. I have never communicated with the plaintiff in New Jersey about Qwest Communications International or its financial results. I have never met with plaintiff in New Jersey about Qwest. I have never called plaintiff in New Jersey about Qwest. I have never written to plaintiff in New Jersey about Qwest. I have never sent a fax to plaintiff in New Jersey about Qwest. I have never sent any documents about Qwest to plaintiff in New Jersey. I have never directed that any documents concerning Qwest be sent into New Jersey.

9. I have never met with William A. Trent, in New Jersey or elsewhere.

10. I did not participate in the June 20, 2001, conference call referred to in the complaint in this action.

11. I have never lived in New Jersey.

12. I have never filed a New Jersey state tax return.

13. I certify that the foregoing statements made by me are true. I am aware that is any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Philip F. Anschutz
Philip F. Anschutz

DATED: March 3, 2003